IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 99 of 1995

with

CRIMINAL APPEAL No 401 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIRSING ALIAS BACHUBHAI THAKORE

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 99 of 1995
   MR DF AMIN for Appellant
   MR AJ DESAI, APP for Respondent No. 1
2. Criminal Appeal No. 401 of 1995
   MR AJ DESAI, APP for Appellant
   MRS SHILPA J UNWALLA for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE M.C.PATEL

Date of decision: 06/08/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.C.PATEL)

1. The appellant in Criminal Appeal No.99 of 1995 was the accused no.1 and the respondent in Criminal Appeal No.401 of 1995 (wife of accused no.1) was the accused no.2 in Sessions Case No.96 of 1994 before the learned Additional Sessions Judge, Court No.4, Ahmedabad City who, by his judgment and order dated 15th December, 1994, convicted the accused no.1 of the offence under Section 302 of the I.P.C. and sentenced him to life imprisonment and acquitted the accused no.2 of the said offence.

2. Virsing @ Bachubhai Becharbhai Thakore - accused no.1 has, therefore, filed Criminal Appeal No.99 of 1995 challenging his conviction, while the State of Gujarat has filed Criminal Appeal No.401 of 1995 challenging the acquittal of Kantaben, the accused no.2.

3. The charge against the accused was that on 24th December, 1993, at about 9 o'clock in the morning, they picked a quarrel with deceased Savitaben, who was the wife of Ratansing, the brother of Virsing, the accused no.1, and Kantaben, the accused no.2 (the wife of Virsing), held her down and the accused no.1 beat her with a wooden bat and throw her down and then threw a carboy of kerosene on her and also threw a lighted matchstick on her and caused burn injuries to her which resulted in her death.

4. The prosecution case is to be found in the complaint of Savitaben which was recorded by P.S.I. Chatrasing Juvansing (p.w.7) and which was treated as her dying declaration after she succumbed to her injuries on 27th December, 1993. Savitaben was married to Ratansing, the brother of Virsing who was the accused no.1, about 10 to 11 years ago. She, her husband and the accused no.1 and 2 were living together. Savitaben and Ratansing had two sons, Alpesh, aged about 7 years and Mukesh, aged about 5 years. Her husband was employed in a factory in Vatva. They were living on the third floor of the house. In the front room, Virsing and Kantaben were living and in another small room, she and her husband were living

with their children. Both the accused were often quarrelling with them because they wanted Savitaben and her husband to leave the house and live separately.

5. At about 8.30 in the morning on 24th December, 1993, Savitaben's husband Ratansing went to work. Savitaben's sister Ranjan had been staying with them for about 10 days. She was taking her bath. At that time, Savitaben told the accused no.2 that she used to sweep the stairs everyday and told her to do so for once. On hearing this, the accused no.1 started giving her abuses. She told him that they should do the sweeping for once. Just then, the accused no.2 Kantaben, saying that she used to dirty her bedding by wiping her feet on it, caught her hand and the accused no.1 picked up a wooden bat and gave two blows on her hand and one blow on her back. Savitaben fell down near the Primus stove which was burning. Just then, her hand fell on the kerosene carboy and its lid came open and kerosene spilled out. The accused no.1 picked up the carboy and threw it on her and said "burn yourself" and saying so, he threw a lighted matchstick on her so that she started burning. She picked up a pail of water and poured it on herself and the accused no.1 and 2 left the house. Thereafter, their landlord Niranjanbhai came and threw a bedding on her. She took off her burnt clothes and put on other clothes. Thereafter, the accused no.1 brought her to V.S. Hospital and she was admitted in the Burns Ward.

6. According to P.S.I. Chatrasing (p.w.7), on 24th December, 1993, he was on duty as P.S.I. in Astodia Police Station. Between 9.30 and 9.45 a.m. both the accused came there and told him that Savita had poured kerosene on herself and after setting a lighted matchstick to her, she had burnt herself. He told them to remove her immediately to V.S. Hospital and said that he would follow them. When he arrived at the V.S. Hospital, Savita had already been admitted to Burns Ward. He wrote a yadi (Exh.19) to the Executive Magistrate for recording her dying declaration. Then, he met the doctor who was attending to Savita and asked him whether she was conscious and whether she was able to speak. He took such an endorsement of the doctor on the yadi which was sent to the Magistrate. He then went to the Burns Ward and saw that Bai Savita was in agony. He questioned her and took down her complaint (Exh.35), the contents of which have already been set out above.

7. The Station Diary entry (Exh.24) shows that the F.I.R. was entered in the diary at 12.20 but the F.I.R. was recorded at 11 o'clock. Before her complaint was

recorded by P.S.I. Chatrasing Juvansing, she was examined by Dr. Vasantbhai J. Joshi (p.w.11). According to him, he was on duty in the Burns and Plastic Surgery Ward. Savitaben was sent to their ward from the Casualty centre. She was conscious but she had received severe burns. They started giving treatment to her. She was taken to the Burns Chamber. When he asked her the history of burns, she said that she had received burns while boiling water on the primus stove. He made a note to that effect in the case papers (Exh.34). His evidence also shows that Savitaben had received 89% burns, some of which were superficial but others were deep. The yadi (Exh.19) which was sent by the police was received by the Executive Magistrate Shri M.R. Shah (p.w.1) at 11.10 a.m. He rushed to V.S. Hospital and arrived there at 11.20 a.m. He cleared the ward of other persons and in order to verify her physical and mental state, he put a few questions to her and he was satisfied that she was competent to give her dying declaration. He recorded her dying declaration in question and answer form. She gave her age as 28 years. She said that she was residing in Lalabhai ni pole, Mandvi ni pole, Astodia and that she was illiterate. When she was asked who were living in the house, she replied, "Jeth, Jethani (the accused no.1 and 2), her mother-in-law, her husband and two children." She said that the incident had occurred in the house at 9.00 in the morning on 24th December, 1993. She gave a brief account of the incident as follows: "Jethani (accused no.2) held her down and Jeth (accused no.1) threw a carboy of kerosene on her and also a lighted matchstick at her and set fire to her. Her husband had gone to work." When she was asked who had caused the burns, she said that her Jethani and Jeth had caused burns. She said that they had been harassing her for 10 years. When she was asked whether she had anything more to add, she said that her mother-in-law, Jeth and Jethani were harassing her. The dying declaration was started at 11.20 and it was finished at 11.45.

8. According to Shantaben Jenaji (p.w.5) - the mother of Savitaben, Savitaben was her daughter by her first husband Ramsing. She was married to Ratansing Becharbhai, the brother of accused no.1 about 12 to 13 years ago. After marriage, Savita was living with her husband Ratansing in Lalabhai ni pole with her Jeth and Jethani (the accused no.1 and 2). About 8 to 10 months ago, when she was at her home in Jetalpur, her daughter Ranjan came and told her to go to Ahmedabad since there had been a quarrel and Savita had been burnt and admitted to hospital. At the time of the incident, Ranjan was living with Savita and used to clean utensils at several

houses. She left for Ahmedabad by bus and went to Savita's house in Lalabhai's pole. No one was there but she came to know from there that Savita was in V.S. Hospital. She went there and met her daughter. She was unconscious and did not tell her anything. The police had not recorded her statement. At this stage, she was declared hostile and she was permitted to be cross-examined. Then she admitted that Savita had told her that she had a quarrel with her Jethani Kantaben about doing the sweeping and the accused no.1 had given her abuses. Kantaben had held her down and she was beaten with a bat and a kerosene carboy was thrown on her and the accused no.1 had set her on fire with a lighted matchstick. However, in cross-examination on behalf of the accused, she stated that she did not know what statement was recorded by the police and that when she went to the hospital, Savita was unconscious.

9. Niranjan Pannalal (p.w.6) was the owner of the house in which the accused and deceased Savitaben and her husband were living. According to him, it was a four-storeyed house including the ground floor. On the third floor, Virsing and his younger brother Ratansing and their family had been living as tenants since before he purchased the house. The relations between the two brothers were not strained but sometimes there used to be quarrels. On 24th December, 1993, he was sleeping in the room on the ground floor. He heard an altercation on the floor where Virsing and Ratansing were living and he woke up. He changed clothes since he wanted to go for a haircut. On hearing more noise, he went upstairs. He saw Ratansing's wife Savitaben burning and her back was towards him. He took a bedding from the house and threw it on her and put out the fire. He also told her to pour cold water on her body and she did so. There was no one in the house and he climbed down and went for a haircut. In cross-examination, he said that when he went down, Ratansing's children were playing in the pole and that he had told them that their mother had received burns.

10. The prosecution also examined Alpesh (p.w.4) who was the elder son of deceased Savitaben. The learned Additional Sessions Judge put a few preliminary questions to him to find out whether he understood the sanctity of oath. In response to several questions, he said that he had studied up to III standard but he could not give his age. He also said that he had dropped out after the death of his mother. However, the learned Additional Sessions Judge was satisfied that he understood the sanctity of oath and he was accordingly administered oath. According to him, after the death of his mother,

he and his younger brother were living with their grandmother at Aslali and their father was living in their original house. Their father sometimes visited them at Aslali. Before the incident, he was living with his parents and younger brother in the house. Both the accused were also living with them in the said house. He said that his mother had died of burns. Bachubhai, the accused no.1 had burnt her with kerosene. At that time, Bachubhai's wife, the accused no.2 was downstairs in the pole. After setting her on fire, Bachubhai took his mother to hospital. Her aunt Ranjanben was also in the house at the time of the incident and she had burnt her feet while trying to save her. Ranjanben had gone to Jetalpur to call her mother. At this stage, the learned APP sought and was granted permission to put questions to him in the nature of cross-examination without declaring the witness as hostile. Thereafter, he said that it was true that when Bachubhai caused burns to his mother, the accused no.2 had held her down. In cross-examination, he denied that, when the incident occurred, they were playing in the pole and that neither of the accused was present in the house when the incident occurred.

11. It appears that Ranjanben, who was allegedly present when the incident occurred and went to call her mother Shantaben after the incident, subsequently died and she was not available to be examined as a witness at the trial.

12. Savitaben succumbed to her burn injuries on 27th December, 1993. The post-mortem was carried out by Dr. Dilipbhai M. Desai (p.w.2) and the post-mortem report is at Exh.13. According to him, there were about 90% burns and they were of 2nd and 3rd degrees on the head, face, neck, arms, chest, abdomen, back and on both lower legs except left lower leg. According to him, the death was due to shock as a result of the burns.

13. Thus, it is not in dispute that Bai Savita died of burns. The panchnama of the place of incident (Exh.26) shows that the various pieces of clothes worn by Savita when she received burns and which she had taken off after the incident were recovered and the F.S.L. report (Exh.38) shows that kerosene residue was found on all the pieces of clothes. Kerosene was also found in the carboy which was lying there.

14. The learned Additional Sessions Judge held that it was probable that the first statement of deceased Savitaben which was recorded by Dr. Vasant J. Joshi in which she said that she had received burns while boiling

water was given under the influence of accused no.1 who had taken her to hospital. However, he accepted the dying declarations recorded by P.S.I. Chatrasing and the Executive Magistrate as genuine and truthful. He also relied on the evidence of the child witness Alpesh. At the same time, accepting the evidence of Alpesh to the effect that the accused no.2 was not present at the place of incident but was in the pole and observing that in the complaint (Exh.35), it was not specifically stated that accused no.2 had held Savitaben down when she was burning and also observing that there were two versions about her presence, he gave benefit of the doubt to her and acquitted her. However, since the learned Additional Sessions Judge accepted the two dying declarations made by Savitaben before P.S.I. Chatrasing and the Executive Magistrate, as far as accused no.1 was concerned, he convicted him of the offence under Section 302 of the I.P.C.

15. Shri D.F. Amin, the learned counsel for the appellant Virsing, who has been convicted, submitted that the learned Additional Sessions Judge had erred in accepting the evidence of the child witness. He also submitted that in the first statement recorded by Dr. Vasantbhai J. Joshi, Savitaben had said that she had received burns while boiling water on the Primus stove and, thus, the three dying declarations were inconsistent with each other and benefit of the doubt must be given to the accused. He also argued that if the first dying declaration is to be discarded, the second dying declaration before the Executive Magistrate requires corroboration. He contended that, even according to the dying declaration, the accused no.1 had thrown a carboy and there was no pouring of kerosene on the deceased, which creates doubt about the manner in which the incident had occurred. He submitted that the version given in the dying declaration was not probable. He contended that the deceased had falsely implicated Kantaben in her dying declarations and when that was the case, the dying declarations cannot be acted upon without corroboration.

16. The learned counsel for Kantaben, the respondent (original accused no.2) in Criminal Appeal No.401 of 1995, filed by the State of Gujarat against her acquittal, supported the submissions made on behalf of the accused no.1 who has been convicted and submitted that Kantaben had rightly been given benefit of the doubt.

17. The learned APP Shri A.J. Desai, on the other

hand, submitted that both the dying declarations were genuine and truthful and deserve to be accepted in their entirety and Kantaben (the accused no.2) also was liable to be convicted and hence, the acquittal appeal should also be allowed.

18. Now, as far as the version recorded by Dr. Vasantbhai J. Joshi in the medical case papers is concerned, the learned Additional Sessions Judge has rightly observed that, at that time, she was under the influence of accused no.1 Virsing and, therefore, her version cannot be believed. That leaves for consideration the subsequent two dying declarations, one recorded by P.S.I. Chatrasing before the Executive Magistrate came and the other recorded by the Executive Magistrate. On the yadi which was sent to the Executive Magistrate, the doctor made an endorsement at 10.50 that the patient was conscious. The Executive Magistrate had also said in his evidence that after putting a few questions to Savitaben, he was satisfied that she was in a fit state to give her dying declaration. Her complaint was recorded by P.S.I. Chatrasing Juvansing before the Magistrate came. Thus, there is no doubt that Savitaben was in a fit state to give the complaint to P.S.I. Chatrasing and the statement to the Executive Magistrate.

19. As far as the evidence of Alpesh is concerned, according to Niranjan Pannalal, the owner of the house who went upstairs on hearing the noise, Alpesh was playing in the pole when he went downstairs. Thus, the presence of Alpesh is doubtful and his evidence is of no assistance to the prosecution. The learned counsel for the accused submitted that, according to the evidence of Niranjanbhai, there was no one in the house when he went there but Savitaben has stated in her complaint (Exh.35) that the accused had left the house and thereafter, Niranjanbhai had come and thrown a bedding on her. P.S.I. Chatrasing's evidence also shows that the accused first went to the police station and gave out that Savitaben herself had poured kerosene on her and set fire to herself. They did not immediately take her to the hospital but it was only after P.S.I. Chatrasing told them to do so, they took her to the hospital.

20. It is significant to note that when her complaint was recorded by P.S.I. Chatrasing at about 11 o'clock, Savitaben's mother or sister were not present because Ranjanben had gone to Jetalpur to fetch her mother. Hence, the version which Savita gave in her complaint was not a tutored version and it could not have been invented by the police officer. Hence, there is no reason not to

accept the same. Similarly, when the dying declaration was recorded by the Executive Magistrate, Savitaben's mother was not there. Thus, both the versions were given by Savitaben without being under the influence of anyone. Reading the version in the complaint, we are satisfied that it is quite a natural description of the incident as it had occurred. In our opinion, both the dying declarations inspire confidence and are truthful and there is no need to seek corroboration. The learned Additional Sessions Judge was, therefore, justified in convicting the accused no.1 on the basis of the same. At the same time, the role attributed to accused no.2 in the complaint (Exh.35) does not show that she took any active part when the accused no.1 caused burns to Savitaben. The complaint shows that there was a quarrel about sweeping and when the accused no.1 gave her a few blows with a wooden bat, she fell down near the Primus and the kerosene had spilled out of the carboy and then, he threw a lighted matchstick on her so that she started burning. In the circumstances, though we believe that Kantaben the accused no.2 was present, she did not participate in the actual incident of causing burns. We, therefore, confirm her acquittal.

21. The result of the above discussion is that both the Criminal Appeal No.99 of 1995 filed by the convicted accused no.1 and the Criminal Appeal No.401 of 1995 filed by the State of Gujarat against acquittal of Kantaben (the accused no.2) fail and are dismissed.

(N.G. Nandi, J.)

(M.C. Patel, J.)

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